IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1014 OF 2001

Jayantilal Vellabhdas Arya @ Patel .... appellant

versus

The State of Maharashtra. ... Respondent.

Shri Ganesh Gole For the appellant
Smt. V.R. Bhosale APP for the State.

ALONGWITH

CRIMINAL APPEAL NO. 1007 OF 2001

Bhiku @ Umesh Chandulal Chitalia & anr...Appellants

versus

The State of Maharashtra .... Respondent

Shri Santosh Khale for the appellants
Smt. V.R.Bhosale APP for State.

CORAM; V.G. PALSHIKAR Acg.C.J.&
SMT.NISHITA MHATRE,J.

DATED; 21ST AUGUST, 2006.

JUDGMENT: (Per Palshikar J.)

1. Both the appeals arise from the same order of conviction passed by the Additional Sessions Judge, Palghar on 20th October 2001 in Sessions case No. 64 of 1997. They are therefore decided by this common order.

2. The prosecution story stated briefly is that, the complainant Pankaj Lakhani is the real brother of deceased Mehul Kumar Lakhani. The complainant alongwith his brother and his wife resides at Shivkripa complex, Nalasopara. That the prosecution case is that all the accused persons were belonging to a separate group, whereas deceased Mehul Kumar Lakhani and witness Chetan Mehta, Bhavesh Bhatt and Hitesh Mehta belonged to different group. That relations between both the groups were strained and there used to be quarrels between them. It is alleged that in the evening of 1-1-1996 Pankaj Lakhani along with his brother deceased Mehul Kumar and his wife and mother had gone to the market to purchase Refrigerator, since it was the birthday of complainant Pankaj Kumar Lakhani on 2-1-1996. The wife and mother of the complainant after seeing the refrigerator had returned home, whereas the complainant and his brother i.e. deceased Mehul kumar had returned home at about 9.30 p.m. by auto rickshaw. It is further alleged that while both the brothers were climbing the stairs of Shivkripa building they found all the three accused alongwith one Thomas sitting on the staircase. It is further alleged that at that time accused Shravan i.e. original accused no.3 had asked Mehul kumar as to why he had removed the air from the bicycle. It is further alleged that Mehul replied that

the air from his bicycle was also removed and he had therefore given his bicycle for repairs. On hearing this accused no.1 Bhiku @ Umesh Chitaliya used filthy language and abused Mehul Kumar. It is further alleged that, when the complainant Pankaj Kumar tried to rescue his brother, at that time the present appellant caught hold of him and scuffled with him. It is further alleged that thereafter accused Umesh @ Bhiku took out a rampuri knife and inflicted two blows of knife on the chest of Mehul. It is further the case of the complainant that the complainant Pankaj tried to catch hold of Bhiku @ Umesh and that he gave jurk to his hands and all the accused ran away from the spot.

3. Then on hearing the shouts people and injured Mehul kumar was removed to Garden view hospital, where the doctor after examining him advised to take him to Bhagwati hospital. The injured was removed to Bhagat hospital at Borivali, where the doctor after examining declared him dead.

4. Under these circumstances report was lodged at Nalasopara police stn. for offences punishable under secs. 302, 323, 504 r/w. 34 of IPC. The investigation was initiated and inquest panchanama was drawn on the dead body of Mehul Kumar and the said body was sent for post mortem. The accused persons came to

be arrested thereafter and one rampuri knife was seized at the instance of accused no.1 from the bushes near the platform of Nalasopara railway station. after the investigation was over charge sheet was filed and the case was committed by the learned Magistrate, Vasai to the court of Additional Sessions Judge, Palghar being Sessions case No.64/1997 by order dated 13-8-1996.

5. During the trial the prosecution examined 12 witnesses and on appreciation of their evidence and other evidence on record, the learned trial Judge came to the conclusion of guilt and convicted the accused persons as under:

The accused No.1 Bhiku @ Umesh Chandulal Chitaliya is hereby convicted of the offence punishable under section 302 of IPC and is sentenced to suffer R.I. for life and to pay a fine of Rs. 1000/- in default to suffer further R.I. for six months.

The accused No.1 Bhiku is also convicted of the offence punishable under sec. 504 IPC and is sentenced to suffer R.I. for six months.

Both the substantive sentences shall run

concurrently. Set off be given to the period undergone by the accused.

The accused nos.2 and 3 viz. Jayantilal Vella Abhdas Arya @ Patel and Sraven Mahadev Sonawane are hereby convicted of offence punishable under sec. 323 read with 34 of IPC and each of them is sentenced to suffer R.I. for the period of one year and to pay a fine of Rs. 1000/- each in default to suffer further R.I. for three months.

The period under gone by these accused during trial be given set off u/sec. 428 Cr.p.C.

The accused nos.2 and 3 are directed to surrender their bail bonds."

6. Criminal Appeal No.1007 of 2001 is filed by the original accused Nos.1 and 3 who have been convicted for imprisonment for life. Criminal appeal No.1014 of 2001 is filed by the accused no.2, who has been convicted u/sec. 323 of IPC. With the assistance of the learned counsel for the appellant and the learned APP, we have scrutinised the record, reappreciated the evidence on record. It was contended by the counsel for the appellant/ accused no.2 that even if the entire

evidence as led by the prosecution is accepted as correct, conviction of the appellant/accused no.2 u/s. 323 IPC is not possible. According to him, conviction under section 323 of IPC postulate of necessity of causing a simple hurt. All that has been proved by the prosecution is that accused no.2 Jayantilal only held the complainant and prevented him from interfering with the assault by the other accused on the deceased Mehul. There is no report of whatever of any injury of any nature on the person of Pankaj, the complainant, who incidently is examined as P.w.8. In the absence of any injury, it cannot be said that simple hurt was caused to the complainant by the accused. No other role is attributed to the complainant. There is also no evidence to show that the accused no. 2 had a common intention of assaulting the victim as nobody had any grievance against the accused no.2. The quarrel was between the accused no.1 and the victim. In our opinion, therefore the conviction of the accused no.2 u/sec. 323 IPC is improbable in law and deserves to be set aside. In the result the appeal No.1014/01 is allowed. The order of conviction is set aside.

7. The evidence of complainant is very clear. He was an eye witness and he gives complete narration of the entire incident. His evidence is duly corroborated by the injury report as proved by the doctor, who

conducted the post mortem. His testimony is further corroborated by the recovery effected by the police during the course of the investigation which were made at the instance of the accused. The entire evidence circumstantial as also oral unmistakably proves that accused no.1 did assault the victim. However in this entire evidence there is nothing to prove that there was any common intention between accused no.1 and 3 and for that matter between any of the three accused persons. Accused no.1 confronted the victim and then staged. No overtact is attributed to accused no.3. In such circumstances, the trial Judge erred in convicting accused no.3 with the aid of section 34 of IPC. There is no evidence of whatsoever of common intention to assault the victim by any of the accused persons. There is no evidence to show that the intention of accused no.1 to harm the victim was shared by other accused persons. Consequently, it is not possible to connect either of the accused with the aid of section 34 or IPC.

8. In so far as accused no.1 is concerned, his conviction is proper and finding recorded by the learned trial Judge in relation to guilty of assaulting the victim is proper. It is however seen that the assault was not intended but was such as the accused knew that it would in all probability cause death. In

our opinion therefore, criminal appeal No.1007/01 is liable to be partly allowed. The conviction and sentence of accused no.3 is set aside. The conviction of accused no.1 u/sec. 302 IPC is set aside. Instead he is convicted under sec. 304 of IPC and is sentenced to suffer imprisonment for a period of ten years. If the period of ten years is already over the accused may be released forthwith.

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